No. 77-229

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANTHONY PACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on two counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1). The trial court sentenced petitioner to concurrent terms of three years' imprisonment on each count (the first six months of which were to be served in a jail-type institution, with the remainder to be waived in favor of probation) and fined him $5,000 on each count. The court of appeals affirmed (Pet. App. A).

The evidence adduced at trial showed that petitioner was engaged in the business of lending money and had not reported income from various loans and business ventures in 1971 and 1972. The majority of petitioner's loans were made to individuals at rates of interest that, in

some instances, were as high as 120 percent per year (Tr. Vol. 1, p. 110). Petitioner did not report any interest income from his money-lending business on his 1971 or 1972 tax returns. In 1971, petitioner loaned a substantial amount of money to a small corporation named T.F.F. (Tr. Vol. 3, p. 99). Upon the departure of the president of T.F.F., petitioner took over its operations and diverted most of its receipts to his own uses (Tr. Vol. 8, p. 81). In July 1971, petitioner incorporated Custom Remodelers, Inc., which moved into the offices formerly occupied by T.F.F. and succeded to its business. At that time, T.F.F. ceased to do business (Tr. Vol. 8, pp. 16, 93-94). Petitioner did not report as income on his income tax return any interest on the T.F.F. loan, any of the funds diverted from T.F.F., or any withdrawals of money from Custom Remodelers (Tr. Vol. 7, pp. 95-96; Tr. Vol. 8, p. 121).

In defense, petitioner testified that he had not reported any income from these transactions because his money-lending business had produced an overall loss, and he believed he did not have to report a loss on his return. Petitioner further testified that he believed he received no income from Custom Remodelers since the only money he received from that corporation he believed to be partial repayment of a loan (Tr. Vol. 7, pp. 95-96; Tr. Vol. 8, pp. 16-17).

1. Petitioner argues (Pet. 5-6) that the district court erred in refusing to permit him to introduce evidence showing he had overpaid his income taxes. But the courts of appeals have uniformly held that in a prosecution for filing a false tax return, the crime is complete with the willful filing of a return which omits items of income. *United States* v. *Ballard*, 535 F.2d 400, 404-405 (C.A. 8); *United States* v. *DiVarco*, 484 F.2d 670, 673 (C.A.

7); *United States* v. *Null*, 415 F.2d 1178 (C.A. 4); *Siravo* v. *United States*, 377 F. 2d 469 (C.A. 1).[1]

At all events, the district court's ruling in no way prejudiced petitioner. In concluding that petitioner could not introduce evidence relating to the computation of his tax liability, the court noted (R. A78-A79)[2] that petitioner could present any aspect of his financial condition that bore on the element of specific intent. Indeed, petitioner testified (Tr. Vol. 7, pp. 95-96) that since his money-lending operations had produced a net loss, he believed he did not have to report the income and deductions from that business on his tax returns. Petitioner's claim therefore was put before the jury for its consideration.[3]

2. Petitioner also contends (Pet. 7-8) that the use of a government expert witness and summary schedules was cumulative, prejudicial, and invaded the province of the jury. This Court, however, has approved the government's use of such expert witnesses and summary schedules as

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[1] *Paritem Singh Poonian* v. *United States*, 294 F. 2d 74 (C.A. 9), upon which petitioner relies (Pet. 6, 7), is distinguishable. There, the taxpayer was charged with filing a false return because he failed to report income he believed was his, but which was, in fact, the income of another person. Under those circumstances, the failure to report such income did not result in a return that was false as to a material matter. Here, on the other hand, petitioner was prosecuted for failing to report income which he had received and which he should have reported.

[2] "R." references are to the record appendix attached to petitioner's brief in the court of appeals.

[3] Petitioner further argues (Pet. 7-8) that the prosecutor's use of petitioner's name in hypothetical questions posed to the government's expert witness was prejudicial. Petitioner did not object to the use of his name in the hypothetical questions, however, and the court of appeals correctly concluded that in any event there was no evidence of any prejudice resulting from this practice (Pet. App. A).

part of the proof in tax cases. *Mackey* v. *United States*, 401 U.S. 667; *Holland* v. *United States*, 348 U.S. 121; *United States* v. *Johnson*, 319 U.S. 503. Here, the use of an expert witness was particularly appropriate to make a showing that items omitted from the tax return were required to be reported on the return. See *United States* v. *Amaral*, 488 F. 2d 1148, 1152 (C.A. 9). As the court of appeals noted (Pet. App. A, p. 2), the expert's testimony was restricted to subject matters which were appropriate for the use of such testimony. See *United States* v. *Green*, 548 F. 2d 1261 (C.A. 6).

The testimony was a summary of the previously presented evidence and an explanation as to how certain items should be reported on a tax return if certain facts in evidence were assumed to be true. Whether those facts were true remained a question for the jury to decide.[4] Thus, the expert's testimony did not invade the province of the jury.

3. Finally, petitioner argues (Pet. 8-10) that the prosecutor's statements during closing argument improperly commented on his refusal to testify. But the comment in question was addressed to disputed evidence, not to petitioner's refusal to testify.

a. In 1970, Louis Kerr owed petitioner a substantial amount of money. At that time Kerr and his T.F.F. Construction Company gave petitioner a note for $270,000

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[4]At the time this testimony was given, the court instructed the jury (Tr. Vol. 6, p. 66):

> * * * any question put to such [an expert] witness and calling for an opinion must be based on assumptions of fact contained in the evidence.
>
> It will be for the jury always to determine whether the assumptions of fact which are put into the question indeed are borne out by the evidence, and whether they are found to be true.

($143,000 principal and the remainder interest), payable at the rate of $1,035 per week. In early 1971, Kerr borrowed an additional $40,000 from petitioner. In April 1971, Kerr began serving a prison term (Tr. Vol. 3, pp. 97-99; Tr. Vol. 8, pp. 7-9). Petitioner then took over the day-to-day operations of T.F.F. Petitioner testified on direct examination that he had operated T.F.F. for a few months and that he sold its vehicles (Tr. Vol. 8, p. 11). He stated that when T.F.F. received payments on contracts, he did not record those receipts on T.F.F.'s books but instead applied them to the T.F.F. obligations to himself (Tr. Vol. 8, p. 81). The substance of his defense was that his money-lending operations lost money because T.F.F. only paid approximately $24,000 on the $143,000 obligation. Petitioner claimed that he sustained an $118,000 loss on that loan that exceeded the income from loans he made to other individuals (Tr. Vol. 7, pp. 95-96, 162-163).

In July 1971, petitioner incorporated Custom Remodelers, Inc., to take over the unfinished jobs of T.F.F., and he loaned Custom $20,000 to start business (Tr. Vol. 8, p. 16). On cross-examination, petitioner testified that he had invested $20,000 to start Custom (Tr. Vol. 8, p. 104), and that Custom had occupied the T.F.F. offices and had started business with T.F.F.'s assets (Tr. Vol. 8, pp. 93-94). T.F.F. was never paid nor were its creditors—it "just stopped" doing business (Tr. Vol. 8, p. 94). Previously, the government had showed Custom had received a check for $4,612.32 that petitioner had deposited in his personal checking account and had not reported on his income tax return. Petitioner claimed that this amount was the only money he had received from Custom and that he had treated it as part repayment on the loan (*e.g.*, Tr. Vol. 8, pp. 112-113).

During petitioner's cross-examination, the government introduced documentary evidence showing that petitioner had received, at different times, $2,000 from Custom (Tr. Vol. 8, pp. 115-119), which he deposited in the account of another of his wholly-owned corporations, a $9,000 check made out to Custom, which he deposited in his personal account (Tr. Vol. 8, pp. 119-120), and a $16,500 check to Custom, which he deposited in his personal savings account (Tr. Vol. 8, pp. 120-121). On redirect examination petitioner testified that the $16,500 was returned to Custom a "day or two later" in amounts of $14,000, $650, and some other items (Tr. Vol. 8, p. 159).

b. In addressing this evidence in closing argument, government counsel argued (Tr. of August 6, 1976, "Excerpt," pp. 25-26):

> That business [Custom] was T.F.F. continued. That is all it was, and this was a way to get out from paying the creditors of T.F.F. and taking over the assets of T.F.F.
>
> If the truth would be known, and the people who had control of the evidence that should be presented here, we would know what in fact the loss was from T.F.F.
>
> Mr. YELSKY: I will object.
>
> THE COURT: Objection sustained. The Jury will understand that argument goes beyond the evidence, and I will tell the Government to absolutely refrain from any further argument on that point.
>
> MR. MICHAELSON: Okay. Yes, sir. We haven't gotten not even a hint that Custom Remodelers had any investment whatsoever. But we know that that 4600 bucks was taken out of there.

> The reason it was taken out of there was because nobody would ever know. It was endorsed and just slipped aside to a personal bank account. That is exactly what happened to it.

Contrary to petitioner's assertions, the prosecutor's statement did not comment on his failure to testify. Indeed, petitioner testified in his own defense for almost two days (Tr. Vol. 7, pp. 85-163, and Vol. 8, pp. 7-163). The purpose of the prosecutor's statement was to refute petitioner's assertion that he had sustained a loss from Custom (see, *e.g.*, Tr. Vol. 6, pp. 58-64). At all events, the district court's immediate admonition to the jury that the prosecutor's statement was not based on facts in the record (R. A76), that statements of counsel are not evidence (Tr. Vol. 8, p. 168), and that "the law does not impose upon an accused the duty of producing any evidence or to prove his innocence" (Tr. Vol. 8, p. 174) eliminated any prejudice arising from the remark.

For the reasons stated, it is repectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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